LAW REFORM
COMMISSION
OF
NOVA SCOTIA

Reform of the Nova Scotia *Wills Act*

Discussion Paper - July 2003

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WHAT DO YOU THINK?

The Law Reform Commission is very interested in what you think about the issues raised in the Discussion Paper, **Reform of the Nova Scotia *Wills Act.***

This Discussion Paper does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission. Your comments will assist us in preparing a Final Report for the Minister of Justice. The Final Report will contain recommendations on how the *Wills Act* should be reformed.

If you would like to comment on the Discussion Paper, you may:

- Fax the Commission at (902) 423-0222
- Send an e-mail to info@lawreform.ns.ca
- Telephone the Commission at (902) 423-2633
- Write to the Commission at the following address:

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In order for us to fully consider your comments before we prepare our Final Report, please contact us by **October 6, 2003.**

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked confidential, the Commission will assume respondents agree to the Commission quoting from or referring to comments made. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Commission to release information contained in submissions.

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act* to *Establish an Independent Law Reform Commission.*

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SUMMARY

A will is the written statement by which a person instructs how his or her property should be distributed when that person dies. Although not mandatory, a will can be an important document for anyone who owns property. By enabling people upon death to have their property distributed as they wish, a will can provide peace of mind. A will can ensure that adequate financial support will be in place for potentially vulnerable people, such as young children. A will can also form the cornerstone of an estate planning strategy, designed to reduce the amount otherwise payable in taxes and probate fees.

In Nova Scotia, the *Wills Act* indicates who may create a valid will, how this should take place, and in what form. The *Act* also sets out how a will may be cancelled or changed and provides some direction about interpreting a will.

The subject of wills is one in which fine details and technical aspects can be especially important. To help prevent misunderstanding and fraud, the law requires consistency in how property is transferred through wills. The *Wills Act* sets out a number of criteria which must be satisfied for the creation of a valid will. If one or more of these factors is not fulfilled, then the will may not be upheld, and the testator's wishes may not be put into effect.

A person who makes a will is known as the "testator". In a will, a testator leaves his or her property or "estate" to individuals or organizations known as "beneficiaries". Most testators name a person or company to act as "executor", who is given authority to act as the testator's personal representative after the testator dies. The executor's duties include gathering assets, paying debts and distributing what remains to the beneficiaries according to the terms of the will.

In general, a testator must be at least 19 years of age. Certain exceptions can apply. A testator may be younger than 19 if that person is married or has been married. Certain members of the military and mariners at sea may also be able to create valid wills, despite being under the age of 19.

The *Wills Act* requires that a will must be in writing and signed at the end by the testator, or by some other person in the testator's presence and by the testator's direction. The testator ordinarily must sign the will in the presence of two or more witnesses, who must also be present at the same time and sign (attest) the will in the testator's presence. A witness or the spouse of a witness cannot benefit under the will. There are no other requirements about witnesses set out in the *Wills Act*. A will which satisfies the requirements for being in writing, being witnessed, and being signed by the testator is known as formally valid.

Preliminary suggestions for reform

The Commission seeks public commentary to assist in developing recommendations for reforming the *Wills Act*. In particular, the Commission invites comments on the preliminary proposals made in this Discussion Paper:

- as a matter of fairness and in recognition of societal trends, the matter of a minimum age requirement for creating a valid will, if it is to be part of the *Wills Act*, should be approached consistently.

- s. 12 of the *Wills Act* should be amended, to eliminate the possibility that it could be used to challenge the appointment of an executor who had witnessed a will.

- the substantial compliance provision from the Prince Edward Island wills legislation, which provides a court with discretion to allow as valid a will which does not comply with all formal requirements, but also requires as a minimum the deceased's signature, should be adopted in Nova Scotia.

- the current *Wills Act* provision which, subject to certain exceptions, revokes a will upon marriage should be retained.

- the Issuer of Marriage Licences should provide a copy of a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence.

- s. 15 of the *Wills Act* should be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

- the penalty for suppression of a will should be retained, but should also be revised upwards, to reflect contemporary currency values.

In relation to certain issues, the Commission seeks additional information before it takes a position. The Commission therefore invites comments on a number of questions, including:

- Whether it would be appropriate to explicitly allow holograph (handwritten & unwitnessed) wills in Nova Scotia.

- Whether privileged wills (which do not have to satisfy the ordinary requirements for validity) should be retained in Nova Scotia, and if so, whether any changes should be made to the availability, nature, or duration of privileged wills.

- Whether there is any perceived need to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia.

- Whether any minimum age for making a will should be set out in the *Wills Act*.

- Whether the *Wills Act* should revoke wills upon divorce.

I. INTRODUCTION

1. The topic

A will is the written statement by which a person instructs how his or her property should be distributed when that person dies.[1] The *Wills Act*[2] governs the creation of a valid will in Nova Scotia. The *Act* indicates who may create a valid will, how this should take place, and in what form. The *Act* also sets out how a will may be cancelled or changed and provides some direction about interpreting a will.

2. Definitions

This Paper attempts to present legal information as clearly as possible. As some of the language relates to specific legal concepts, the words used may not be familiar to everyone. This section provides definitions of such words used in this Paper.

Act Law made by elected members of government. Also referred to as "statute" or "legislation".

Administrator Person appointed to administer the estate of a person who died without appointing an executor in a will or without leaving a will.

Attest When a witness signs a will to show he or she witnessed the testator signing the will.

Beneficiary Person or organization to whom property is left by a will.

Bequest Gift of personal property under a will.

Common law Law developed over the years by judges when making decisions in court.

Common law relationship When two people of the same or opposite sex live together as spouses, but are not legally married to each other and have not registered a domestic partnership.

Devise Gift of land under a will.

Estate Everything that a person owns at the time of his or her death.

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[1] D.A. Dukelow & B. Nuse, *A Dictionary of Canadian Law* (Scarborough, Ont.: Carswell, 1991) at 1162.

[2] R.S.N.S. 1989, c. 505 [hereinafter, the *Wills Act*].

Executor	A person or corporation named in a will to carry out the will's terms and to act as the deceased person's representative. Duties include gathering assets, paying debts, and distributing whatever remains in accordance with the will. An executor is a type of trustee, who holds property for the benefit of others.
Executrix	Sometimes used to describe a woman who acts as an executor.
Heir	Person entitled by legislation to receive the property of an intestate.
Holograph will	A will done entirely in the testator's handwriting and signed by the testator, but not witnessed.
Intestate	A person who dies without a valid will, thereby creating the situation of an intestacy.
Issue	A person's lineal descendants, such as children and grandchildren.
Legislation	Law made by elected members of government. Also referred to as "Act" or "statute".
Minor	A person under the age of majority, which is currently 19 in Nova Scotia.
Personal Property	Anything capable of ownership that is not real property.
Power of appointment	A power given to a person to choose who will receive certain property after the person to whom the power is given dies.
Privileged will	A will which does not have to satisfy the ordinary requirements for validity.
Probate	The legal procedure for proving that a will is the last will of the deceased, that the will is valid, and that the person or corporation named as executor is entitled to act. Probate enables the payment of a deceased person's debts and the transfer of a deceased person's assets to their beneficiaries to proceed in accordance with the will and in a prompt and orderly manner.
Real property	Land, buildings attached to land, as well as permanent fixtures or improvements to land.
Registered domestic	What occurs when two people, regardless of their sex, who are in a conjugal relationship, but who are not married, register their relationship.

partnership	Registering a domestic partnership provides many of the same rights and obligations applicable to married couples.
Revocation	An act by which a person who makes a will cancels it.
Statute	Law made by elected members of government. Also referred to as "Act" or "legislation".
Testamentary	Pertaining to wills.
Testamentary capacity	Whether a testator was of sound mind, memory and understanding at the time of making a will.
Testate	Describes a person who dies with a valid will.
Testator	Person who makes a will.
Testatrix	Sometimes used to describe a woman who makes a will.
Will	The written statement by which a person instructs how his or her property should be distributed when that person dies.

3. Prior reform efforts in Nova Scotia

The first Nova Scotia statute concerning wills was enacted in 1758.[3] Until the 19th century, the same legislation governed wills, intestacy, and probate. In 1840, following developments in England, Nova Scotia enacted a separate wills statute.[4] Although the current statute uses more modern language and contains some additional provisions, the origins of many sections in the present *Act* can be traced to those in the 1840 legislation.

During the last century, the *Wills Act* was amended on only a few occasions, and those changes were limited in nature. In 1934, the Assembly removed a restriction on a married woman's ability to leave more property to her husband by way of will than he would have received in an intestacy.[5] In 1940, the rule was added that no will would be invalid simply

[3] S.N.S. 1758, c. 11.

[4] S.N.S. 1840, c. 25.

[5] S.N.S. 1934, c. 34.

because the testator did not leave any heirs or next-of-kin.[6] Changes in 1941 and 1956 made minor corrections to the *Act*'s language.[7] In 1977, the Assembly eliminated an unnecessary phrase which seemed to imply that for some types of wills, a married woman would have to obtain her husband's consent.[8] In 1983, the right to make a valid will was extended to minors (people under the age of majority), if they were married or had been married.[9] Two years later, in 1985, concern that the *Wills Act* did not fully comply with the *Charter of Rights and Freedoms* led to additional changes which removed unjustified distinctions in the context of married women.[10]

4. Other reform efforts in Canada

In contrast to the infrequent amendment of the Nova Scotia *Act*, for many years the topic of reforming wills legislation has interested the Conference of Commissioners on Uniformity of Legislation in Canada, as well as its successor, the Uniform Law Conference of Canada. The Uniform Law Conference of Canada (ULCC) is an independent organization which promotes the uniformity of legislation in Canada concerning subjects for which uniformity may be found possible and advantageous. The Conference first adopted a *Uniform Wills Act* in 1929.[11] Most Canadian jurisdictions have adopted parts of the *Uniform Wills Act*, which has been revised from time to time since 1929.[12] Whether a jurisdiction adopts a portion of the *Uniform Wills Act* depends on such factors as governmental priorities and the contents of the wills legislation in that jurisdiction. In 2000, Nova Scotia enacted Part III of the *Uniform Wills Act*, designed to give effect to an international agreement signed by the Canadian government on the form of international wills.[13] Among others which are not included in the Nova Scotia *Act*, the

[6] S.N.S. 1940, c. 25.

[7] S.N.S. 1941, c. 32; S.N.S. 1956, c. 47.

[8] S.N.S. 1977, c. 18, s. 28.

[9] S.N.S. 1983, c. 48, s. 1.

[10] S.N.S. 1985, c. 7, s. 18.

[11] Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Twelfth Annual Meeting* (Quebec, Que., 1929) at 37.

[12] Online: Uniform Law Conference of Canada, "Uniform Statutes," "Table of Uniform statutes enacted, listed by statute," <http://www.chlc.ca/en/us/index.cfm?sec=3> (date accessed: 15 July 2003).

[13] S.N.S. 2000, c. 7. This *Act* made part of Nova Scotia law the *Convention Providing a Uniform Law on the Form of an International Will*. An "international will", namely one created in compliance with the Convention, will be valid as to form wherever the Convention applies, regardless of where the will is made,

Uniform Wills Act contains provisions relating to the validity of holograph (handwritten & unwitnessed) wills, the validity of wills upon "substantial compliance" with the *Act* and the effect of divorce on wills.[14]

Where relevant as a possible guide to reform, aspects of the *Uniform Wills Act* will be mentioned in this Discussion Paper.

In recent years, law reform commissions in Alberta, British Columbia, Manitoba, and Ontario have also examined wills legislation in their respective jurisdictions.

5. Development of the project

In 1999, the Commission published the Final Report, *Probate Reform in Nova Scotia*. The Commission had undertaken that project upon the request of the Nova Scotia government. The Commission's recommendations were well-received. The following year, a new *Probate Act*,[15] which reflected many of the Commission's proposals for reform, was enacted.

During the consultations which led to the probate Final Report, the Commission received a number of suggestions for reform of the *Wills Act*, a related statute. Although the Commission valued those suggestions, they were not directly part of the Commission's mandate to study the *Probate Act*. As a result, the Commission identified the *Wills Act* suggestions in an appendix to the *Probate Act* Final Report, but took no further steps. The Commission has decided to return to those additional suggestions, as part of a specific review of the *Wills Act*.

Further to the Commission's general practice, it formed an Advisory Group to help identify issues relevant to a discussion of possible reforms to the *Wills Act*. The Advisory Group consisted of people familiar with law and practices relating to wills and estates in Nova Scotia. The Advisory Group met in March and May 2003, in order to review background materials prepared by Commission staff and to discuss how the *Wills Act* could be improved. The Commission is grateful for the participation and suggestions of the Advisory Group members.

Although not mandatory, a will can be an important document for anyone who owns property. By enabling people upon death to have their property distributed as they wish, a will can provide peace of mind. A will can ensure that adequate financial support will be in place for

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and the location of the assets transferred by the will. An international will would therefore likely be of interest to those Nova Scotians who might move outside the province.

[14] Holograph wills are discussed below at part III.A.1. Substantial compliance is discussed at part III.A.6, and the effect of divorce is discussed at part III.B.

[15] S.N.S. 2000, c. 31.

potentially vulnerable people, such as young children. A will can also form the cornerstone of an estate planning strategy, designed to reduce the amount otherwise payable in taxes and probate fees. As the legislation which governs the creation of a valid will in Nova Scotia, the *Wills Act* is therefore not just important for people who work with wills, namely lawyers and judges, as well as employees of banks or trust companies. Rather, the *Wills Act* is significant for anyone in Nova Scotia who is concerned about how his or her property will be distributed upon death.

The next part of this Discussion Paper provides general information on wills in Nova Scotia. Part III contains discussion of specific issues, as well as proposals for reform.

II. GENERAL INFORMATION

1. What does a will do?

A will is the written statement by which a person instructs how his or her property should be distributed when that person dies.[16] A person who makes a will is known as the "testator".[17] If a person dies leaving a valid will, he or she is said to have died "testate".

In a will, a person leaves his or her property or "estate" to individuals or organizations known as "beneficiaries". Most testators name a person or company to act as "executor", who is given authority to act as the testator's personal representative after the testator dies.[18] The executor's duties include gathering assets, paying debts and distributing what remains to the beneficiaries according to the terms of the will.

2. Requirements for creating a formally valid will

The subject of wills is one in which fine details and technical aspects are especially significant. To help prevent misunderstanding and fraud, the law requires consistency in how property is

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[16] Dukelow & Nuse, note 1, above, at 1162. This section is not meant as an exhaustive discussion of wills law. Rather, it is meant to provide an introduction to sections of the *Act* and related concepts relevant to the Commission's proposals for reform.

[17] "Testatrix" is sometimes used to describe a woman who makes a will. Unless otherwise required by the circumstances, "testator" will be used in this Discussion Paper to refer to people, whether male or female, who make a will.

[18] "Executrix" is sometimes used to describe a woman who acts as executor. Unless otherwise required by the circumstances, "executor" will be used in this Discussion Paper to refer to both male and female executors.

transferred through wills. The *Wills Act* sets out a number of criteria which must be satisfied for the creation of a will to be valid. If one or more of these factors is not fulfilled, then the will may not be upheld. These factors help to ensure that only a testator's true intentions about disposing of his or her property in the event of death are put into effect. Requirements concerning how a will was created and its form can therefore be very important in discussions involving the law of wills.

The *Wills Act* requires that a will must be in writing and signed at the end by the testator, or by some other person in the testator's presence and by the testator's direction.[19] The testator ordinarily must sign the will in the presence of two or more witnesses, who must also be present at the same time and sign (attest) the will in the testator's presence. A witness or the spouse of a witness cannot benefit under the will.[20] There are no other requirements about witnesses set out in the *Wills Act*. In particular, consistent with other wills legislation in Canada, the *Wills Act* does not require a witness to be of a certain age.[21] A will which satisfies the requirements for being in writing, being witnessed, and being signed by the testator is known as formally valid.

3. Age of a testator

In general, a testator must be at least 19 years of age.[22] Certain exceptions can apply. A testator may be younger than 19 if that person is married or has been married.[23] Certain members of the military and mariners at sea may also be able to create valid wills, despite being under the age of 19.[24]

4. Testamentary capacity

In addition to the *Wills Act*, the common law imposes certain requirements for a valid will.

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[19] *Wills Act*, note 2, above, s. 6.

[20] Such a gift is void (invalid) unless there are two other witnesses who do not benefit under the will. If a gift in a will is void, that does not make the entire will invalid: note 2, above, s. 12.

[21] In accordance with the common law, a witness must be mentally competent and able to reason: J. MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000), para. 4. 29. The common law is a body of law developed over the years by judges when making decisions in court. A witness must also not be blind: D.A. Howlett, *Estate Matters in Atlantic Canada* (Scarborough, Ont.: Carswell, 1999) at 34.

[22] Note 2, above, s. 4(1).

[23] This exception is discussed further at part III.A.4.

[24] For more information, see III.A.2.

Collectively, these requirements can be referred to as testamentary capacity, whether a testator was of "sound mind, memory and understanding" at the time of making a will.[25] A testator must understand what the will is meant to accomplish. The testator must be aware of the nature and extent of his or her property. The testator must appreciate who might benefit from the will, what each beneficiary might receive, and the claims of those who might be excluded under the will.[26]

5. When a will is not followed

At common law, a person had complete freedom to dispose of his or her property in a will.[27] The existence of certain legislation, however, now means that in some circumstances property may be distributed contrary to a testator's wishes. The *Testators' Family Maintenance Act*[28] applies if a person has made a will which does not adequately provide for his or her dependants. The dependants may apply to court for maintenance and support to be paid from the deceased's estate. The *Act* defines "dependant" as the testator's widow, widower or child. "Child" includes both natural and adopted children, as well as natural children of the testator not born at the date of the testator's death. The *Act* does not distinguish between children born inside or outside of a marriage.[29] In addition to married people, the *Act* applies to registered domestic partners.[30] It does not, however, apply to common law relationships, in which two people of the same or opposite sex live together as spouses, but are not legally

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[25] Quoted in *Canadian Estate Administration Guide*, vol. 1 (North York: CCH Canadian Ltd., 1997) at para. 7650.

[26] Note 25, above, at para. 7650.

[27] MacKenzie, note 21, above, at para. 2.6.

[28] R.S.N.S. 1989, c. 465.

[29] Note 28, above, s. 2(a).

[30] S.N.S. 2000, c. 29 s. 45; A registered domestic partnership occurs when two people, regardless of their sex, who are in a conjugal relationship, but who are not married, register their relationship. Registering a domestic partnership provides domestic partners with many of the same rights and obligations applicable to married couples: Online: Service Nova Scotia & Municipal Relations, "Vital Statistics - Domestic Partnerships," <www.gov.ns.ca/snsmr/vstat/certificates/domestic.stm> (date accessed: 1 April 2003). More particularly, under the *Vital Statistics Act*, R.S.N.S. 1989, c. 494, s. 54, upon registration of a domestic partnership, domestic partners have, as between themselves, and with respect to any person, the same rights and obligations as a "wife or husband" under the *Wills Act* and are subject to the "same operations of law" as a "wife or husband" under the *Wills Act*.

married to each other and have not registered a domestic partnership.[31] The *Act* lists factors to be considered by the court on an application for support, including the dependant's financial circumstances, the claims of any other dependants and the relationship of the dependant and testator at the time of the testator's death.[32]

The *Matrimonial Property Act* also applies to people who are married, or to registered domestic partners, but it does not relate to common law spouses.[33] It provides that where a spouse has died, the surviving spouse may apply to have matrimonial assets divided in equal shares, regardless of ownership.[34] This right is in addition to any other rights the spouse has as a result of the death of the other spouse. For example, the spouse may have rights as a dependant under the *Testators' Family Maintenance Act*. The spouse may also have rights under the will. Nova Scotia courts have held that a division of property under the *Matrimonial Property Act* takes place before the provisions of a will are applied.[35] As a result, a surviving spouse's share of property is deemed never to have been part of the deceased spouse's estate and is not available for distribution to the beneficiaries.

6. Dying without a valid will

A person who dies without leaving a valid will is said to have died "intestate". An "heir" is a person entitled by legislation to receive the property of an intestate. The *Intestate Succession Act*[36] lists the categories of heirs in order of priority. Entitlement is based upon being legally married to, in a registered domestic partnership with, or related to, the deceased. For example, if a testator upon death is survived by a spouse and two or more children, and the estate is worth more than $50,000, the spouse is entitled to $50,000 and one-third of the balance of the estate. The children are entitled to divide the remaining two-thirds equally. The spouse may, however, elect to take the matrimonial home. If it is worth more than $50,000, the spouse takes the home instead of the $50,000 entitlement. If the home is worth less than $50,000, it is taken as part of the $50,000 entitlement.

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[31] C. L. Chewter & R. Hartleib, *Understanding the Law: A Guide for Women in Nova Scotia*, 4th ed. (Halifax: Nova Scotia Association of Women and the Law, 2002) at 13, 108; Howlett, note 21, above, at 162.

[32] Note 28, above, s. 5.

[33] R.S.N.S. 1989, c. 275, s. 2(g); S.N.S. 2000, c. 29, s. 45; *Nova Scotia (Attorney General)* v. *Walsh*, 2002 SCC 83.

[34] Matrimonial Property Act, note 33, above, s. 12(1)(d).

[35] See, for example, *Fraser* v. *Fraser Estate* (1981), 50 N.S.R. (2d) 55 (T.D.), and *Pulley* v. *Pulley Estate* (1996), 153 N.S.R. (2d) 143 (S.C.), overturned for other reasons (1997), 159 N.S.R. (2d) 79 (C.A.).

[36] R.S.N.S. 1989, c. 236.

The *Intestate Succession Act* does not apply to common law spouses. Rather, it applies to married spouses and registered domestic partners.[37] Furthermore, the *Intestate Succession Act* does not permit spouses "living in adultery" at the time of the other's death to take any part of the deceased spouse's estate.[38] No distinction is made between the inheritance rights of children born inside or outside marriage. Both are entitled to claim as heirs to the estate of their natural father and the estate of their natural mother.[39] Adopted children will be able to claim as heirs against the estates of their adopting parents.[40]

If a person dies without leaving a valid will, there is no executor. The executor's duties still need to be performed, however, in that the assets must be gathered, the debts paid and the remainder of the estate distributed according to the *Intestate Succession Act*. In such cases, the *Probate Act* provides for the court to appoint an "administrator" to act as the deceased's personal representative with the same duties and responsibilities as an executor. The appointment is made according to the order of priority set out in the *Probate Act*.[41] The surviving spouse or registered domestic partner and any children resident in Nova Scotia are the first people entitled to be appointed as administrator.

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[37] S.N.S. 2000, c. 29, s. 45; Chewter & Hartleib, note 31, above, at 108.

[38] *Intestate Succession Act*, note 36, above, s. 18.

[39] Under an earlier version of the *Intestate Succession Act*, children born outside of marriage could inherit from their natural mother, but not from their natural father. The relevant section of the *Act* was changed following two case decisions in which Nova Scotia courts found the section to be inconsistent with the Canadian *Charter of Rights and Freedoms*. See *Tighe* v. *McGillivray* (1994), 127 N.S.R. (2d) 313 (C.A.); *Surette et al.* v. *Harris Estate* (1989), 91 N.S.R. (2d) 418 (T.D.).

[40] Under the *Children and Family Services Act*, R.S.N.S. 1989, c. 5, s. 80, an adopted child is treated "for all purposes" as the child of the adopting parents. The decision in *Hart* v. *Hart Estate* (1993), 124 N.S.R. (2d) 333 (N.S.S.C.), which specifically involved an adopted person's *Testators' Family Maintenance Act* claim, in general supported the inheritance rights of an adopted person against the estates of his or her biological parents. As a result, an adopted person in Nova Scotia, in addition to claiming as an heir against the estates of his or her adopting parents, may also be considered an heir in the event of intestacies involving the estates of his or her biological parents.

[41] Probate Act, note 15, above, s. 32.

7. Wills of First Nations people

The wills and estates sections of the federal *Indian Act* and the *Indian Estates Regulations*[42] apply to First Nations people who are registered or entitled to be registered as an "Indian" under the *Indian Act*[43] and who "ordinarily reside" on reserve or Crown lands.[44] People may be considered to ordinarily reside on reserve lands even if they are away, as long as they are only away temporarily, such as to attend school, to work or to stay in a health care facility.[45]

The requirements for a will in the *Indian Act* are less demanding than those set out in the provincial *Wills Act*. Under the *Indian Act*, any written instrument that is signed and in which a person indicates his or her intention regarding the disposition of property may be accepted as a will.[46] As a result, witnesses are not required, and holograph wills[47] may be acceptable.

A problem may arise, however, if a First Nations person makes a will that would be accepted as a will under the *Indian Act*, and that person later moves off reserve. If that person dies while off reserve, his or her family may attempt to process the estate in the provincial probate system. The will may not meet the provincial requirements and may be found to be invalid. The estate will then be considered intestate, and the testator's wishes may not be followed.

Another difference in administering estates of First Nations people is that the Minister of the Department of Indian Affairs and Northern Development may exercise powers that would otherwise be exercised by the Probate Court. For example, in accordance with the criteria at s. 46 of the *Indian Act*, the Minister may declare a will to be void. The Minister therefore exercises the powers of a judge over estate administration for First Nations people living on reserve.

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[42] R.S.C. 1985, c. I-5, ss. 42-52; C.R.C., 1978, c. 954. See generally L. Kraft, "Wills and Estates Under the *Indian Act*" (Paper presented to the Continuing Legal Education Society of Nova Scotia, 16 February 1996) [unpublished]; D.F. English, "A Written Will - A Promise Kept" (Paper presented to the Canadian Bar Association - Nova Scotia, 30 January 1998) [unpublished].

[43] *Indian Act*, note 38, above, ss. 5-7.

[44] *Indian Act*, note 38, above, s. 4(3).

[45] Kraft, note 42, above, at 1.

[46] *Indian Act*, note 42, above, s. 45(2).

[47] A holograph will is done entirely in the testator's handwriting and is signed by the testator, but is not witnessed: *Canadian Estate Administration Guide*, note 25, above, at para. 5400. Holograph wills are discussed in detail at part III.A.1.

This Paper will not deal specifically with the administration of estates under the *Indian Act*, as that topic falls within federal jurisdiction and is therefore outside the mandate of a provincial law reform commission. The issue of reform in this context would be more appropriately dealt with by the federal Law Commission of Canada, which considers the merits of reforming laws under the control of Parliament.[48]

III. PROPOSALS FOR REFORM

A. FORMATION OF A WILL

1. Holograph wills

A holograph will is done entirely in the testator's handwriting and is signed by the testator, but is not witnessed. It must show an intention by the testator to dispose of his or her property after death.[49] The majority of Canadian and United States jurisdictions, though not Nova Scotia, expressly allow holograph wills.[50] The *Uniform Wills Act* also provides that "[a] will, wholly in the testator's own writing and signed by the testator, is validly made...."[51]

An example of a holograph will being upheld as valid was in *Ley Estate* v. *Mifflen*.[52] The deceased L was an elderly widow who lived alone. The day after L died, a document titled "my last will & testament" was found inside a writing pad on L's kitchen table. The document listed various persons and charities with amounts or items listed after their names. L had signed the document. The New Brunswick Probate Court accepted that the document clearly showed L's testamentary intentions.

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[48] That Commission's website is online at: <www.lcc.gc.ca/en> (last accessed: 15 July 2003).

[49] MacKenzie, note 21, above, at para. 4.45.

[50] Howlett, note 21, above, at 32. The other two Canadian jurisdictions which do not provide for holograph wills are British Columbia and Prince Edward Island. Although the Nova Scotia *Wills Act* does not allow holograph wills in general, they may be permitted as a type of "privileged" will, a topic discussed at part III.A.2.

[51] Uniform Law Conference of Canada, *Consolidated Statutes* (Ottawa: The Conference, various dates) at 53-1, s. 6(2).

[52] (1987), 82 N.B.R. (2d) 18 (N.B. Prob. Ct.).

Holograph wills can be justified as facilitating the wishes of certain people for how their property should be distributed when they die. Holograph wills are free and convenient. They do not require the involvement of any other person. They can be made at any time, which could be especially important for those people without a will who find themselves in an emergency situation. Some people might choose a holograph will over no will at all. For these reasons, allowing holograph wills in Nova Scotia might, at first glance, seem like a good idea.

Some people might be concerned, though, that to introduce holograph wills could encourage more people to prepare wills without the benefit of legal advice. This might increase the likelihood that a person's will would not satisfy all requirements for validity or would not accomplish what the testator would ideally have chosen. For example, someone preparing a holograph will may overlook such basic features as naming a personal representative.

Although simple to create, a holograph will could involve a complicated probate process. For example, given the lack of witnesses, there could be disputes about the authenticity of a holograph will.

Before adopting a position on holograph wills, the Commission would like to take into account readers' comments. The Commission is especially interested in suggestions about the advantages or drawbacks of expressly permitting holograph wills. The Commission therefore invites comments on the appropriateness of explicitly allowing holograph wills in Nova Scotia.

The Commission invites comments:

- **on the appropriateness of explicitly allowing holograph wills in Nova Scotia.**

2. Privileged wills

The law has long recognized that it could be difficult for people in dangerous or inconvenient circumstances to satisfy the ordinary criteria for creation of a valid will. For instance, a soldier at the front may not have access to pen and paper. Even if writing materials are available, a will may be destroyed during battle, or a witness to a will may be killed or captured. As a result, soldiers in special circumstances have long been able to transfer their personal property by way of "privileged" wills, which do not have to satisfy ordinary requirements. Similarly, for many years mariners while

at sea have been able to make wills without having to satisfy the regular criteria. In Nova Scotia, as long as a witness is able to testify as to the intentions of certain soldier or mariner testators, expressed at some time before death, these wishes may be upheld even though not strictly in conformity with the ordinary requirements of wills legislation.[53] A privileged will under Nova Scotia law can even be an oral one. Privileged wills can transfer both personal and real property.[54]

If a person entitled to create a privileged will does so under the required special circumstances, but survives and is no longer subject to those conditions, the will remains valid indefinitely, like any other validly created will.[55] As a result, for example, a mariner who created a holograph will at sea would not have to re-write the will upon returning safely to land.

The ability to make a valid privileged will is not meant to be enjoyed by all soldiers. Legislation enabling privileged wills limits their availability to soldiers in certain situations. The Nova Scotia *Act* uses the term "being in actual military service," which can be traced back to a 17th century English statute.[56] The majority of other Canadian provinces and territories use the term "active service," seemingly adopted from the *Uniform Wills Act*. In 1956, the term "active service" was added to the *Uniform Wills Act* as being consistent with the then-*National Defence Act*. The current version of the *National Defence Act* uses the same term. The Governor-in-Council (federal Cabinet) decides which members of the Canadian Forces will be placed on active service.[57] The term "active service" is not defined now, nor was it defined in the 1956 version of the *National Defence Act*. The *Uniform Wills Act* also does not define "active service," apart from indicating that "a member of a naval, land or air force is deemed to be on active service after he has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of such a force that has been placed on active service."[58]

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[53] For example, though the *Wills Act* does not expressly allow holograph wills, they may be permitted if prepared by soldiers or mariners in the appropriate circumstances. Also, a soldier or mariner does not have to be at least 19 years of age in order to create a valid privileged will.

[54] Wills Act, note 2, above, s. 9.

[55] MacKenzie, note 21, above, at para. 4.96.

[56] *An Act for prevention of Fraud and Perjuryes*, 1677 (Eng.), 29 Cha. 2, c. 3, s. 22.

[57] For example, see *Order Placing Members of the Canadian Forces on Active Service (Arabian Peninsula)*, S.I./90-111, C. Gaz. 1990. II. 4199.

[58] Note 51, above, s. 5(3).

The standard "actual military service" that is used in Nova Scotia seems to be a higher one to satisfy than "active service." In *Re Wheatley's Estate,*[59] the Nova Scotia Probate Court had to determine the validity of a holograph will made by W, who had died during the 1980s as a member of the Canadian Armed Forces on active service in Germany. After examining cases from England and Australia, the court decided that "active service" was not the same as "actual military service." "Actual military service" was treated as a more restrictive concept, which had to be "directly concerned with operations of war which is or has been in progress or is imminent."[60] By contrast, a person could be on "active service" during peace time.[61] As holograph wills were not permitted under the *Wills Act*, the court did not admit W's holograph will to probate. The implication of the *Wheatley* case is that wills created by armed forces members at the same time and under the same conditions might be considered valid privileged wills in some provinces, but not in Nova Scotia.

The Commission would like to obtain additional perspectives prior to making any recommendations about privileged wills, and a number of questions can help provide direction for public feedback. One question which comes to mind is whether privileged wills are still necessary, given the advancements that have taken place in communications and transportation in the centuries since privileged wills were first developed.

Assuming that the answer to that question is "yes", then other questions can arise about the nature of privileged wills. One is whether privileged wills should be extended to any other occupational groups. Soldiers and mariners at sea are not the only people whose regular work conditions can be hazardous, and who could find themselves faced with a life-threatening situation. Police and firefighters are two other examples.

One might also ask whether any restrictions should be placed on the nature of a will which is acceptable as a privileged one. For instance, should oral wills be excluded, because of difficulties of proof, or are they appropriate given the perilous circumstances in which they could be contemplated?

Another potential question about privileged wills relates to their duration. Currently, a privileged will is valid as any other, even if the testator has survived the hazardous situation during which the will was created. In situations where the creator of a

[59] (1984), 95 N.S.R. (2d) 66 (Prob. Ct.)

[60] Note 59, above, at 70.

[61] Note 53, above, at 73-74.

privileged will survives, should that person be required to substitute a regular will for the privileged one within a certain time period?

In summary, the Commission is interested in readers' comments about whether privileged wills should be retained in Nova Scotia, and if so, whether any changes should be made to the availability, nature, or duration of privileged wills.

The Commission invites comments:

- on whether privileged wills should be retained in Nova Scotia, and if so, whether any changes should be made to the availability, nature, or duration of privileged wills.

3. Videotape, cinematographic & electronic wills

Late in the Commission discussions which led to this Discussion Paper, the topic of wills in non-paper formats arose. This could involve wills on videotape, cinematographic film, or on electronic data retention devices, such as a computer diskette. This technology was not in existence when wills legislation was first created. Today, however, one might imagine a person reading aloud his or her testamentary wishes in front of a video or cinematographic camera. A person might also type a will using a computer keyboard and store the information on a computer diskette or hard drive.

With the exception of privileged wills, the *Wills Act* requires wills to be in writing and signed by the testator or by someone on his or her behalf. A tape or film of a testator reading his or her instructions would not be in writing, unless perhaps the tape or film also captured the complete text of the will. Similarly, a tape or film would lack the testator's signature. A computer diskette might arguably satisfy the requirement for a written will, in that the will's details, though stored in computer code, could be printed; the will's contents would nonetheless lack a signature from the testator.

The Commission has not researched the technical aspects of this issue, which would be essential to any meaningful proposals for reform. One would need to know, for instance, how easy it would be to tamper with the images on a video or film, or the text on a diskette. Before doing so, the Commission would like to gauge whether the subject of wills in non-paper formats is one which needs to be examined in Nova Scotia at the moment. The Commission has no indication there is a perceived need for such will formats in Nova Scotia. The Manitoba Law Reform Commission recently

published a discussion paper on wills law in that province. Commenting on that discussion paper, Cliff Edwards, President of the Manitoba Commission, stated: "What we said in our discussion was this is probably something that should be looked at more carefully in a province with a bigger population base which might tend to have these problems, like Ontario or Quebec." He added, "In our province, we didn't feel it was such a big problem and we didn't go into it."[62]

Following the experience in Manitoba, this Commission would like more information before investigating this issue further. This Commission therefore invites readers' comments on whether there is any perceived need to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia.

The Commission invites comments:

- on whether there is any perceived need to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia.

4. Wills by minors

In Nova Scotia, one can obtain a driver's licence at age 16 and vote in a provincial election at age 18. One can join the armed forces at 17. In general, though, only people 19 years or older may make a valid will in Nova Scotia. This age requirement does not, however, apply to people who are married, or who have been married. Another exception involves armed forces members or mariners at sea who take advantage of their ability to create privileged wills.

The *Wills Act*'s approach to the age of a testator may not be fair or appropriate in a number of instances. Many people under the age of 19 work and in some cases, such as those involved in the high-tech industry or professional sports, are capable of accumulating significant wealth at an early age. Having taken the initiative to acquire such property, they would likely have an interest in how it is distributed in the event of their deaths. Single parents who have never married and who are younger than 19 would likely be surprised to learn that though able to raise a child, they are not entitled to make a valid will.

[62] D. Driver, "Manitoba Law Reform Commission calls for changes in law on wills, succession" *The Lawyers' Weekly*, (27 June 2003) 18.

The Commission understands that some young people may lack the maturity needed to plan for the distribution of their property in the event of their deaths. They may be impressionable and subject to the undue influence of others. The *Act* seems to try to address this by setting the age of majority (19) as the minimum age at which one may ordinarily create a will. However, certain exceptions in the *Act* mean that it does not treat all minors in the same manner. The Commission is of the view that as a matter of fairness and in recognition of societal trends, the matter of a minimum age requirement for creating a valid will, if it is to be part of the *Wills Act*, should be approached consistently. The Commission invites suggestions about what minimum age, if any, for making a will should be set out in the *Wills Act*.

The Commission suggests:

- as a matter of fairness and in recognition of societal trends, the matter of a minimum age requirement for creating a valid will, if it is to be part of the *Wills Act*, should be approached consistently.

The Commission invites suggestions:

- about what minimum age, if any, for making a will should be set out in the *Wills Act*.

5. Executor as witness

Under section 12 of the *Wills Act*, if a witness benefits in any way under the will, the benefit to that person will not be allowed. The witness will still be permitted, however, to attest to the will's validity in general. This section seems designed to avoid the possibility that a witness will falsely attest to the valid creation of a will in any event, simply because he or she benefits under the will. It is also possible that a witness who benefits under a will has put undue pressure on the testator to create the will. The question arises as to whether this rule applies to an executor.

The law requires a means to allow an executor to receive and distribute a testator's property upon the testator's death. To do so, the law makes a distinction between "legal" ownership of property and "beneficial" ownership. Where a will grants the property to him or her, a legal owner can sell or give the property, in accordance with the testator's instructions, but is not entitled to benefit. As the name suggests, a

beneficial owner enjoys the benefits of a property.[63] An executor receives legal title to a testator's property, so the executor can deal with the property in the interest of beneficiaries under the will.

Section 12 specifically states, "[e]very devise, bequest or appointment, other than a charge or direction for the payment of debts, to an attesting witness of the will, or to the wife or husband of such witness, is void...."[64] The concern has been expressed that based on a literal reading of section 12, "appointment" could include the appointment of an executor. The appointment of an executor could be challenged, simply because he or she had acted as an attesting witness. It is quite common for an executor to witness the signing of a will.[65]

By referring to a "devise bequest or appointment" without any qualifier, s. 12 fails to distinguish between receiving something under a will legally or beneficially. The word "beneficial" was part of the Nova Scotia statute until 1851, when deleted in what seems to have been an attempt to rid the statute of unnecessary language.[66] It has therefore been suggested that one can in part prevent problems involving executors in the context of s. 12 by re-inserting the term "beneficial" before "devise, bequest or appointment." The section would therefore read: "Every beneficial devise, bequest or appointment, other than a charge or direction for the payment of debts, to an attesting witness of the will, or to the wife or husband of such witness, is void...." If an executor is not a beneficiary under the will, his or her appointment would not be "beneficial," and there would be no difficulty arising from the executor having also served as a witness.[67]

Also deleted from the *Act* in 1851 was a qualifying phrase, "of or affecting any real or personal estate," which was formerly located in the *Act* immediately after the word, "appointment." The appointment of an executor is of a person. By contrast, an appointment "of or affecting any real or personal estate" would involve the power to give that real or personal property to someone. It has therefore been suggested that

[63] See, for example, Howlett, note 21, above at 65, 285.

[64] A devise is a gift of land (real property) under a will, and a bequest is a gift of personal property under a will: *Canadian Estate Administration Guide*, note 25, above, at 503, 505.

[65] Howlett, note 21, above, at 36.

[66] Howlett, note 21, above, at 36-37.

[67] An executor is entitled to reimbursement of expenses, as well as a commission, which is set by law or by the terms of the will. These amounts are not considered a benefit under the will: Howlett, note 21, above, at 135.

"of or affecting any real or personal estate" should be restored to the *Act*, to clarify that the section is not restricting the appointment of an executor.

A recent Nova Scotia case, *Re Kyte Estate*,[68] could signal that courts will not read s. 12 of the *Act* literally, to invalidate the appointment of executors who witness a will. A beneficiary applied for removal of an executrix. One of the witnesses to creation of the will had been the executrix's husband. The beneficiary argued that this was in conflict with s. 12 of the *Act*. In rejecting the beneficiary's argument, the Nova Scotia Probate Court held that the word "appointment" in s. 12 does not refer to the nomination or appointment of an executor or executrix. The court pointed out that the appointment of a person as an executor or executrix does not confer a specific benefit on that person.

In *Armstrong Estate* v. *Weisner*,[69] an executor had acted as one of the two witnesses to a will. This did not seem to concern the Supreme Court of Nova Scotia. However, the court questioned whether s. 12 in its current form could transfer property to an executor. The court reviewed the pre-1851 Nova Scotia *Act*, as well as the English legislation on which it had been modelled. The court concluded that the same interpretation should be used that would have applied prior to certain deletions from the pre-1851 *Act*. As a result, the court "read-in" or supplied certain missing language, and s. 12 was interpreted as if it contained the term, "beneficial," as well as the phrase "so far only as concerns such person attesting the execution of such will."

The decisions in *Re Kyte Estate* and in *Armstrong* suggest that Nova Scotia courts may not support the use of s. 12 of the *Act* to overturn the appointment of an executor who was also a witness to a will. This does not mean, however, there is no problem with the wording of s. 12. Indeed, in *Armstrong*, the court's "reading-in" of missing words in its interpretation is a sign that s. 12 is problematic. The Commission is of the view that s. 12 should be amended, to eliminate the possibility that it could be used to challenge the appointment of an executor who had witnessed a will.

[68] *Kyte Estate, Re* (1998), 169 N.S.R. (2d) 192 (Prob. Ct.).

[69] (1969), 1 N.S.R. (1965-69) 58 (N.S.S.C.T.D.).

The Commission suggests:

- section 12 of the *Wills Act* should be amended, to eliminate the possibility that it could be used to challenge the appointment of an executor who had witnessed a will.

6. Substantial compliance

Even if a will does not adhere to all formal requirements for its creation, a court might still find the will to be valid, if the failure to comply with certain formal criteria is not considered too serious. This is known as the concept of "substantial compliance". Substantial compliance attempts to give effect to a testator's wishes, if they can be established to the court's satisfaction, though not all criteria of the wills statute are fulfilled.

In some jurisdictions, courts are explicitly given the authority to find certain wills to be formally valid, though they have not met all requirements. For instance, the Prince Edward Island substantial compliance provision reads as follows:[70]

Sec. 70. ***Substantial compliance. – if on application to the Estates Section the court is satisfied***

(a) ***that a document was intended by the deceased to constitute his will and that the document embodies the testamentary intentions of the deceased; or***

(b) ***that a document or writing on a document embodies the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,***

the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act but provided that the document or writing is signed by the deceased, order that the document or writing, as the case may be, be fully effective as though it had

[70] *Probate Act*, R.S.P.E.I., c. P-21, s. 70. Manitoba (R.S.M. 1988, c. W150, s. 23) and Saskatchewan (S.S. 1996, c. W-14. 1, s. 37) also have substantial compliance provisions.

been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

In the Prince Edward Island wills legislation, the substantial compliance standard is therefore for the court to be "satisfied...that a document was intended by the deceased to constitute his will and that the document embodies the testamentary intentions of the deceased." If the court is so satisfied, and if the will has been signed by the deceased, then the court may deem the will to "be fully effective as though it had been executed in compliance with all the formal requirements imposed by this *Act* as the will of the deceased...." This standard gives discretion to the court, which must be "satisfied" that in the circumstances, the document embodies the deceased's testamentary intentions. Also included is a minimum, objective requirement, that the document contain the deceased's signature.

In jurisdictions without explicit substantial compliance provisions, courts have sometimes taken the initiative to apply substantial compliance reasoning. In *Sisson* v. *Park Street Baptist Church*,[71] an Ontario case, the court had to determine the validity of a will which did not fully comply with the formal requirements of the Ontario wills statute. The will in question did not include the required signatures of two witnesses. Although one witness, who was the lawyer for the testatrix, placed the date on the will, he neglected to sign the will.

The will did not contain two witnesses' signatures, but other details supported the argument that the will genuinely represented the intentions of the testatrix: there was a letter of instruction from the testatrix to her lawyers; two witnesses were present when the testatrix signed the will; one of the two witnesses signed the will; and the other witness placed the date on the will.

There was no statutory provision which expressly permitted the court to find the will to be valid, though it did not comply with all formal requirements. Referring to other cases where Ontario courts had accepted wills not completely adhering to formal criteria, the court reasoned that an absence of legislation should not prevent the court from developing the common law. In the matter before it, the court held that sufficient safeguards had been established to prevent the type of mischief that wills legislation had been created to avoid. Satisfied that the will reflected the intentions of the testatrix, the court accepted it.

[71] (1998), 24 E.T.R. (2d) 18 (Ont. Gen. Div.).

Vaillancourt Estate v. *Vaillancourt*,[72] a New Brunswick case, also involved a will with the signature of only one witness, which meant that the will did not strictly conform to the requirements of the New Brunswick wills statute. A second witness had signed the will, but had not been present when the testatrix and the other witness signed. The New Brunswick legislation did not (and does not) have a substantial compliance section. Nonetheless, applying substantial compliance reasoning, the court found the will to be valid. There was no evidence of lack of capacity, fraud or undue influence. The court had no doubt that the will had in fact been signed by the testatrix, and that the will represented her intentions. The testatrix had properly signed the will in front of one witness, and the other witness knew both the testatrix and the first witness. Moreover, no one had come forward to oppose the will.

It can seem harsh not to allow a testator's wishes because of non-compliance with formal or technical aspects of the legislation. On the other hand, there are certain basic requirements of wills legislation, meant for the protection of testators and other people, which must be respected. Otherwise, the need for any statutory standards for the creation of wills could be called into question. The Commission is of the view that in certain circumstances, it should be appropriate for a court to find a will to be valid, even if the will did not comply with all formal requirements of the *Wills Act*.

As a matter of clarity and consistency, the Commission suggests that the circumstances in which a court in Nova Scotia would be entitled to find a will to be valid on the basis of substantial compliance should be made explicit. The Commission is therefore in favour of making an express substantial compliance provision part of the *Act*. The Commission suggests that the Prince Edward Island substantial compliance provision, which provides a court with discretion to allow as valid a will which does not comply with all formal requirements, but also requires as a minimum the deceased's signature on the document, should be adopted in Nova Scotia.

The Commission suggests:

- the Prince Edward Island substantial compliance provision, which provides a court with discretion to allow as valid a will which does not comply with all formal requirements, but also requires as a minimum the deceased's signature, should be adopted in Nova Scotia.

[72] (2000), 235 N.B.R. (2d) 209 (N.B.Q.B.).

B. REVOCATION OF A WILL

Effect of marriage and divorce

At common law, a marriage cancelled ("revoked") a person's will, regardless of intention. This recognized marriage as a significant event, involving important new responsibilities. The reason for the common law rule seemed to be to benefit the testator's new family, who as the testator's heirs, would inherit under a resulting intestacy.[73] The effect of the common law has been continued into legislation. In all Canadian jurisdictions except Quebec, legislation revokes wills upon marriage.[74] In Nova Scotia, this is subject to three exceptions: that the will declares it was made in contemplation of marriage; that the testator's wife or husband elects in writing to take under the will; or that the will is made in exercise of a power of appointment over property which would not pass to the benefit of the testator's family if the power was not used.[75]

The Commission thinks that the current Nova Scotia provision concerning the effect of marriage is appropriate and should be retained. To enter upon marriage is to agree to significant responsibilities in relation to another person. Commission believes that most people would, upon their deaths, wish their spouses to benefit from their estates. To revoke a will upon marriage encourages people to think about the implications of their new legal status and to make necessary changes in their instructions to apply in the event of death. If they fail to create another will, then other statutes (the *Intestate Succession Act*[76] and the *Matrimonial Property Act* [77]) will be available to ensure that their spouse, and if applicable, children, do benefit.

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[73] MacKenzie, note 21, above, at para. 5. 9.

[74] Howlett, note 21, above, at 39. It seems that by virtue of the *Vital Statistics Act*, note 30, above, s. 17 of the *Wills Act* would also apply to people who enter a registered domestic partnership.

[75] *Wills Act*, note 2, above, s. 17. A power of appointment refers to a power given to a person to choose who will receive property after the person to whom the power is given dies. Dukelow & Nuse, note 1, above, at 795. For instance, a grandfather in his will could instruct that rather than giving his summer cottage outright to his daughter, he is allowing her to use the property for the rest of her life, along with a power of appointment, which if exercised at her death in her will will be put into effect to decide which of her children will receive the property.

[76] Note 36, above.

[77] Note 23, above.

Based on anecdotal reports, the Commission is, however, of the view that not many Nova Scotians are aware of the provision which revokes a will in the event of marriage. The Commission therefore suggests it would be helpful if the Issuer of Marriage Licences would provide a copy of a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence.

The *Wills Act* does not mention divorce. Given the turmoil that can surround a divorce, having a will revoked may not be foremost in people's minds. There could be a tendency to forget about a will. This could lead to unforeseen and unwanted circumstances if a former spouse benefits under a will. As a result, in some jurisdictions, getting a divorce will mean the revocation of one's will. The *Uniform Wills Act* also addresses the consequences of divorce for a will. If a testator makes a will and obtains a divorce prior to his or her death, and unless the will provides otherwise, any devise, bequest, appointment or power to the testator's spouse is revoked, and the will is to be construed as if the spouse had pre-deceased the testator.[78]

On the other hand, in some situations, divorced spouses might still wish to provide for a former spouse in a will. These people might also consider it intrusive and inconvenient for legislation to automatically revoke a will upon divorce.

The Commission acknowledges there are reasons for and against extending the *Wills Act* to revoke wills upon divorce. At the moment, the Commission does not consider the reasons for such a change to be sufficiently compelling to justify suggesting that the *Act* be changed. The Commission invites comments about the appropriateness of having the *Wills Act* revoke wills upon divorce.

[78] Wills Act, note 2, above, s. 17(2).

The Commission suggests:

- The current *Wills Act* provision which, subject to certain exceptions, revokes a will upon marriage should be retained.
- The Issuer of Marriage Licences should provide a copy of a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence.

The Commission invites:

- comments about the appropriateness of having the *Wills Act* revoke wills upon divorce.

C. OPERATION AND INTERPRETATION OF A WILL

The anti-lapse section

At common law, if a beneficiary predeceases the testator, and the will does not indicate what should happen, the gift is presumed to "lapse", and be of no effect, thereby forming part of the remainder of the testator's estate. To prevent this from occurring, it is common for wills legislation to include an "anti-lapse" provision. When a person who is the child or other issue[79] of a testator is a beneficiary under the will and predeceases the testator, but leaves issue alive at the time of the testator's death, then by virtue of the anti-lapse provision, the gift to the deceased beneficiary shall not lapse, assuming that the will does not provide otherwise. Rather, as with section 31 of the *Wills Act*, a gift will take effect as if the death of the beneficiary had occurred immediately after the testator's death. The gift, however, becomes payable to the estate of the deceased beneficiary.

[79] "Issue" refers to a person's lineal descendants, such as children and grandchildren: Howlett, note 21, above, at 2. The *Wills Act* defines issue as "lawful lineal descendants," which would appear to exclude descendants born outside of marriage. Given that the decision in *Hart* v. *Hart Estate* (1993), note 40, above, upheld the inheritance rights of an adopted person against the estates of his or her biological parents, the *Wills Act* definition of "issue" may be subject to a court challenge as discriminatory and therefore not consistent with the *Charter of Rights and Freedoms*.

Therefore, under the *Wills Act* a gift from a testator to a beneficiary who dies before the testator is preserved only when the beneficiary is a descendant of the testator and has left issue of his or her own alive at the death of the testator. Some people may argue that if a provision only comes into effect because a deceased beneficiary has issue, then implicitly, the anti-lapse provision is signalling it is important to preserve testamentary gifts by allowing them to proceed, if necessary, through the generations. Having said this, it would seem strange to provide under s. 31 that a gift will be payable to a deceased beneficiary's estate, rather than to any issue. As one author on wills law has pointed out, the effect of s. 31, depending on what was stated in the deceased beneficiary's will, may be not to provide the issue with the gift: "So if, for example, the deceased beneficiary had a will, in which he left everything to a charity, the gift in the original testator's will would be preserved (because the beneficiary died leaving issue) but the charity – not the issue – would receive the gift!"[80]

Another perspective on this issue is that to alter s. 31, by having gifts revert to a deceased beneficiary's issue, rather than to the beneficiary's estate, is not consistent with the concept of preserving a person's testamentary wishes. Unquestionably, s. 31 as currently written helps to put into effect the testator's wishes, but what about the deceased beneficiary? It could be presumptuous to assume that the beneficiary would want to leave any gifts, received by virtue of s. 31, to his or her issue. Referring to the quoted example in the previous paragraph, the only clear direction about what the deceased beneficiary intended is to be found in his or her wish to leave everything to a charity. Unless that beneficiary had contravened some other law, as for example, by failing to properly provide for dependant children, then one could argue that the merit of fulfilling the deceased beneficiary's wishes is just as strong as having a gift revert to his or her issue.

Based on the perspectives mentioned above, the Commission does not think there is a sufficiently strong reason to alter the anti-lapse provision at s. 31 of the *Wills Act*, to make a gift payable to the deceased beneficiary's surviving issue, rather than to the beneficiary's estate. As it would be helpful to have additional perspectives on this issue, the Commission invites comments on the appropriateness of amending the anti-lapse provision.

The Commission invites:

- comments on the appropriateness of amending the anti-lapse provision, to make a gift payable to the deceased beneficiary's surviving issue, rather than to the beneficiary's estate.

[80] Howlett, note 21, above, at 51.

D. OTHER ISSUES

1. Wills made outside Nova Scotia

Section 15 of the *Wills Act* involves wills created outside Nova Scotia. These wills may be admitted to probate in Nova Scotia if they satisfy the formal requirements of one of the following: Nova Scotia law; the law of the place where the will was made; the law of the testator's "domicile"[81] at the time of making the will; or the law in force in the testator's original domicile. Section 15 does not refer to real property (land). It only mentions the admissibility of these wills in connection with personal property, such as automobiles, furniture, or sums of money.[82] As a result, if created in accordance with one of the laws identified at s. 15, a will made outside Nova Scotia can be admitted to probate in Nova Scotia and transfer personal property, but not real property. The real property would be transferred in accordance with the rules involving intestacies.[83]

As in Nova Scotia, the standard approach to this issue in Canada is for the law of the place where land is situated to govern questions of the land's transfer. For instance, *Canadian Conflict of Laws*[84] indicates: "as a general rule, all questions concerning rights over immovables are governed by the *lex situs*, namely the law of the place where the immovable is situated." Any other approach may not be effective, they suggest, "because in the last resort land can only be dealt with in a manner which the *lex situs* allows." In an earlier edition, the same text explained that "this principle is based upon obvious considerations of convenience and expediency."[85] This general rule extends to the transfer of real property upon the owner's death.

The general rule is also followed in the *Uniform Wills Act*, which at s. 39 (1) provides that "[t]he manner and formalities of making a will, and its intrinsic validity and effect, so far as

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[81] Domicile is not the same as one's place of actual residence. Rather, it refers to the legal jurisdiction with which one has the closest connection and where one intends to make a permanent home: Howlett, note 21, at 2.

[82] Real property refers to land, buildings attached to land, as well as any permanent fixtures or improvements to land. Personal property involves anything capable of ownership that is not real property: Howlett, note 21, above, 2.

[83] T.G. Feeney, *The Canadian Law of Wills*, 3d. ed. (Toronto: Butterworths, 1987), vol. 1, at 190, n. 85.

[84] J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed. (Markham, Ont.: Butterworths, 2002) at para. 23.2. See also G. Groffier, in *Précis de Droit International Privé Québécois*, 4th ed. (Cowansville: Éditions Yvon Blais, 1990) at para. 152.

[85] J.-G. Castel, *Canadian Conflict of Laws*, 3d. ed. (Toronto: Butterworths, 1994) at 437.

it relates to an interest in land, are governed by the internal law of the place where the land is situated."

Among Canadian jurisdictions, only in Ontario has the general principle been relaxed in the context of wills. S. 37 (1) of the *Succession Law Reform Act*[86] does confirm the application in general in Ontario of the standard approach: "the manner and formalities of making a will, and its essential validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated." However, the Ontario *Act* goes on to indicate that a will is considered valid and admissible to probate in Ontario if at the time of the will's making it complied with the internal law of one of the following places: where the will was made; where the testator was then domiciled; where the testator then had his or her habitual residence; or where the testator then was a national if there was in one place one body of law governing the wills of nationals. Those criteria apply not only to wills pertaining to personal property, but also to interests in land.

The Commission understands that there are historical reasons which likely explain the distinction made between personal and real property at s. 15 of the *Wills Act*. Land was the main source of wealth, and jurisdictions monitored its use and transfer very closely. Also, because land cannot be moved outside a jurisdiction, it cannot escape the effect of the law of the jurisdiction where the land is situated.[87] The Commission does not, however, think there is any longer a compelling reason to retain the distinction at s. 15. The value of land cannot be used as the only justification. There are many examples of personal property--bonds, share certificates, money--which can be worth far more than land. In terms of possible concerns about the standards for creating wills outside Nova Scotia, these cannot be that significant, as they do not preclude a will created outside the province from entering Nova Scotia probate. In its current form, s. 15 can serve as a source of frustration and inconvenience for people who have created a will outside Nova Scotia, and who have land in the province.

The Commission suggests that s. 15 should be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

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[86] R.S.O. 1990, c. S. 26.

[87] See, for example, P.M. North & J.J. Fawcett, *Cheshire and North's Private International Law*, 12th ed. (London: Butterworths, 1992) at 784-785.

The Commission suggests:

- s. 15 should be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

2. Suppression

Someone might wish to conceal a will, so that its terms are not put into effect. For example, imagine the scenario of an elderly parent, whose spouse is no longer living, but who has two adult children. If the parent has made a will which gives most of the estate to one child, then the other child would fare better if the will was never put into effect, and an intestacy was declared. That second child, if aware of the parent's will and its contents, might be tempted to hide the will.

The *Wills Act* at s. 33 provides a penalty of $20 for each month during which a will is suppressed. The penalty begins to accrue 30 days from the time when the will should first have been made public. The amount of the penalty has remained unchanged since 1864, when $20 would have represented a considerably larger amount than it does today.[88]

The Commission has no indication that people in Nova Scotia commonly suppress wills. The Commission also notes that under s. 340 of the Canadian Criminal Code, "every one who, for a fraudulent purpose, destroys, cancels, conceals or obliterates" among others a will is liable to imprisonment for up to 10 years.

The Commission is, however, of the view that s. 33 of the *Wills Act* still has a purpose. Being aware of s. 33 might prevent some people from suppressing a will. In situations where suppression of a will has occurred, the application of a fine through s. 33 might be seen as more appropriate than a jail sentence under the Criminal Code. If, however, s. 33 is to remain in the *Act*, the amount of the penalty must reflect the seriousness of the prohibited activity. The current amount of $20 a month is not much of a deterrent. The Commission thinks that the $20 per month penalty for suppression of a will should be revised upwards, to reflect contemporary currency values.

[88] Currency values change over time for many reasons. To provide a rough idea of how much $20 could formerly buy, the Bank of Canada estimates at its website <www.bank-banque-canada.ca/en/inflationcalc.htm> that $20 in 1914 (earliest year for which figures are provided) would be worth $341.11 in 2003 (date accessed: 2 June 2003).

The Commission suggests:

- the penalty for suppression of a will should be retained, but should also be revised upwards, to reflect contemporary currency values.

IV. LIST OF PROPOSALS

A. Formation of a Will

1. **Holograph wills** [pages 12-13]

   The Commission invites comments on:

   - the appropriateness of explicitly allowing holograph wills in Nova Scotia.

2. **Privileged wills** [pages 13-16]

   The Commission invites comments on:

   - whether privileged wills should be retained in Nova Scotia, and if so, whether any changes should be made to the availability, nature, or duration of privileged wills.

3. **Videotape, cinematographic & electronic wills** [pages 16-17]

   The Commission invites comments on:

   - whether there is any perceived need to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia.

4. **Wills by minors** [pages 17-18]

   - As a matter of fairness and in recognition of societal trends, the matter of a minimum age requirement for creating a valid will, if it is to be part of the *Wills Act*, should be approached consistently.

   The Commission invites suggestions:

   - about what minimum age, if any, for making a will should be set out in the *Wills Act*.

5. **Executor as a witness** [pages 18-20]

   - Section 12 of the *Wills Act* should be amended, to eliminate the possibility that it could be used to challenge the appointment of an executor who had witnessed a will.

6. **Substantial compliance** [pages 21-23]

- The Prince Edward Island substantial compliance provision, which provides a court with discretion to allow as valid a will which does not comply with all formal requirements, but also requires as a minimum the deceased's signature, should be adopted in Nova Scotia.

B. Revocation of a Will

7. **Effect of marriage and divorce** [pages 24-26]

- The current *Wills Act* provision which, subject to certain exceptions, revokes a will upon marriage should be retained.

- The Issuer of Marriage Licences should provide a copy of a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence.

The Commission invites comments:

- about the appropriateness of having the *Wills Act* revoke wills upon divorce.

C. Operation and Interpretation of a Will

8. **The anti-lapse section** [page 26-27]

The Commission invites comments on:

- the appropriateness of amending the anti-lapse provision, to make a gift payable to the deceased beneficiary's surviving issue, rather than to the beneficiary's estate.

D. Other Issues

9. **Wills made outside Nova Scotia** [pages 28-30]

- S. 15 should be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

10. **Suppression** [pages30-31]

- The penalty for suppression of a will should be retained, but should also be revised upwards, to reflect contemporary currency values.